

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

VICTORIA ACOSTA)	
Claimant)	
VS.)	
)	Docket No. 206,691
NATIONAL BEEF PACKING COMPANY, L.P.)	
Respondent)	
AND)	
)	
WAUSAU INSURANCE COMPANIES)	
Insurance Carrier)	

ORDER

The respondent and its insurance carrier appealed the April 28, 1999 Order entered by Administrative Law Judge Pamela J. Fuller. The Appeals Board heard oral argument in Wichita, Kansas, on October 8, 1999.

APPEARANCES

Diane F. Barger of Wichita, Kansas, appeared for the claimant. D. Shane Bangerter of Dodge City, Kansas, appeared for the respondent and its insurance carrier.

ISSUES

This is a claim for a September 8, 1995 accident. The Appeals Board initially entered an Order in this proceeding on February 2, 1999, which granted claimant benefits for a permanent partial general disability. Following that Order, the claimant filed a demand for payment.

After learning that the claimant may have filed this claim under another's name and/or social security number, the respondent and its insurance carrier filed several pleadings requesting (1) review and modification of the Appeals Board's Order awarding claimant benefits, (2) that the Order awarding claimant benefits be vacated, (3) that the payment of compensation be stayed, (4) that claimant be compelled to appear at a deposition and produce documents, and (5) that the claim be dismissed at the request of the Victoria Acosta allegedly issued the social security number used by the person who filed this claim.

After conducting a hearing on April 22, 1999, the Judge denied the requests to vacate or stay the Order granting claimant benefits. But the Judge granted the request to compel claimant to appear at a deposition and produce documents concerning the proof of her identity. The Judge took under advisement claimant's request to deny the application for review and modification and the request for penalties. Additionally, at the hearing the Judge set the parties' terminal dates for purposes of rendering a final award for review and modification purposes.

Claimant contends the Judge erred by (1) ordering her to appear at a deposition and produce documents and (2) taking under advisement the request for penalties.

Conversely, the respondent and its insurance carrier contend the Judge erred by (1) failing to dismiss the claim at the request of the Victoria Acosta whose social security number matches that used in this claim and (2) failing either to stay or vacate the payment of benefits until it can be determined who should be paid and in what amounts.

The issues before the Board on this appeal are:

1. Is it proper to stay the payment of benefits upon a preliminary showing of facts that constitute such fraud that would void the initial award of benefits?
2. Did the Judge err by failing to dismiss this claim at the request of the Victoria Acosta allegedly issued the social security number used by the person who filed this claim?
3. Did the Judge err by ordering claimant to appear at a deposition and produce documents?
4. Did the Judge err by taking under advisement claimant's request for penalties?

FINDINGS OF FACT

After reviewing the entire record, the Appeals Board finds:

1. On February 2, 1999, the Appeals Board issued an Order requiring National Beef Packing Company, L.P., and its insurance carrier to pay Victoria Acosta temporary total and permanent partial disability benefits totaling \$78,608.38.
2. Since entering that Order, National Beef and its insurance carrier located another Victoria Acosta living in Austin, Texas, who swears that (1) she is the person issued the social security number used in this claim, (2) she has never worked for National Beef Packing Company, L.P., (3) she did not file this workers compensation claim, and (4) she desires this claim be dismissed.
3. After learning the above and alleging fraud, National Beef and its insurance company requested review and modification of the February 2, 1999 Order; an order vacating the

February 2, 1999 Order; an order staying benefits pending resolution of the issues; and an order compelling claimant to appear at a deposition and produce documents.

4. In the same time frame, claimant's attorney filed an application for penalties and an objection to the requested review and modification proceeding.

5. On April 22, 1999, Judge Fuller conducted a hearing to address the various requests filed by the parties. At that hearing the Victoria Acosta of Austin, Texas, testified. Based upon that testimony, the Appeals Board finds that claimant has filed this claim either under an assumed name and/or has provided an incorrect social security number.

CONCLUSIONS OF LAW

1. National Beef and its insurance carrier first request that this claim be dismissed in its entirety as that was the desire of the Victoria Acosta of Austin, Texas, at the April 22, 1999 hearing. Although it provides a simple solution to a difficult situation, the Appeals Board does not believe that it is the appropriate solution. The claimant was injured while working for National Beef Packing Company, L.P., on September 8, 1995, and filed a workers compensation claim. Therefore, that individual is entitled to receive whatever benefits the Workers Compensation Act may provide.

2. National Beef and its insurance carrier request the Order granting claimant benefits be either set aside or modified on the basis of misrepresentation and fraud. Conversely, claimant requests immediate payment of the outstanding benefits and asserts that any fraud that she may have committed is not actionable. The proceeding now before the Appeals Board is in the nature of a review and modification proceeding as National Beef and its insurance carrier request a change in an order that was previously entered that awarded benefits.

3. This is a claim for a September 1995 accident. Therefore, any preexisting functional impairment should be subtracted from the award.¹ Also, the permanent partial general disability rating is determined by averaging the loss of ability to perform former work tasks with the difference in pre- and post-injury wages.² An individual's medical and work history is material in determining the permanent partial general disability rating and final award. Obtaining an accurate medical and work history, or at least providing the opposing parties an opportunity to investigate, requires that an individual provide a true identity. Also, National Beef and its insurance carrier are correct that an individual's status as a citizen or an alien may affect the computation of the permanent partial general disability rating. Therefore, the Appeals Board concludes that individuals who misrepresent their true identity, depending on the circumstances, may have committed fraud or serious misconduct

¹ K.S.A. 44-501(c).

² K.S.A. 44-510e.

that may be grounds to void the initial award *ab initio*. It cannot be genuinely argued that such misrepresentation is harmless.

4. The Workers Compensation Act provides that an award can be reviewed and modified when the award was obtained by fraud or serious misconduct. The Act's review and modification statute provides:

Any award or modification thereof agreed upon by the parties, except lump-sum settlements approved by the director or administrative law judge, whether the award provides for compensation into the future or whether it does not, may be reviewed by the administrative law judge for good cause shown upon the application of the employee, employer, dependent, insurance carrier or any other interested party. . . . The administrative law judge shall hear all competent evidence offered and if the administrative law judge finds that the award has been obtained by fraud or undue influence, that the award was made without authority or as a result of serious misconduct, that the award is excessive or inadequate or that the functional impairment or work disability of the employee has increased or diminished, the administrative law judge may modify such award, or reinstate a prior award, upon such terms as may be just, by increasing or diminishing the compensation subject to the limitations provided in the workers compensation act.³

5. The review and modification statute specifically limits the effective date for modifications due to a change in either the functional impairment or work disability. Impliedly, the statute does not limit the effective date of the changes due to fraud or serious misconduct. The Act provides:

Any modification of an award under this section on the basis that the functional impairment or work disability of the employee has increased or diminished shall be effective as of the date that the increase or diminishment actually occurred, except that in no event shall the effective date of any such modification be more than six months prior to the date the application was made for review and modification under this section.⁴

6. In construing statutes, the legislative intent is determined from considering the entire Act.⁵

³ K.S.A. 44-528(a).

⁴ K.S.A. 44-528(d).

⁵ McGranahan v. McGough, 249 Kan. 328, 820 P.2d 403 (1991).

7. The Kansas Supreme Court has stated that an important objective of workers compensation law is avoiding cumbersome procedures and technicalities of pleading so that a correct decision may be reached by the shortest and quickest possible route.⁶

8. Further, the Division is not bound by technical rules of procedure but should give the parties reasonable opportunity to be heard and to present evidence, insure an expeditious hearing, and act reasonably and without partiality.⁷

9. Where a preliminary showing has been made that establishes that fraud or serious misconduct has been practiced upon an opposing party, which may be grounds to void the award in its entirety or require that the record be reopened to redetermine the nature and extent of injury, the judges have the authority to stay the payment of benefits until additional evidence is taken and a final award is entered for purposes of review and modification. Otherwise, the intent of the review and modification statute in addressing fraud and serious misconduct would be completely defeated. The claimant's rights are protected as a preliminary showing is required and payments are stayed only during the pendency of the review and modification proceeding.

10. Citing the Teague⁸ case, Claimant argues that it is error to stay payment of the award. The Appeals Board disagrees and notes that Teague did not involve potential fraud. The Board concludes that the stay is entered as part of the review and modification proceeding. In addition to the power conferred upon the administrative law judges under the review and modification statute, there is a general power to set aside judgments obtained by fraud. Larson's states:

Apart from reopening for change in condition where available under the foregoing analysis, and apart from express statute, awards and settlements cannot be disturbed except upon a showing that they were procured by fraud. **This remedy may be based on either specific provisions of the compensation act or upon the general power of courts to set aside judgments obtained by fraud. . . .**⁹ (Emphasis added.)

11. The Appeals Board concludes there has been a preliminary showing of fraud or serious misconduct which may render the initial award of benefits void. Therefore, the benefits due under the Appeals Board's February 2, 1999 Order are stayed until further evidence is taken and a final award is entered in the review and modification proceeding.

⁶ Pyeatt v. Roadway Express, Inc., 243 Kan. 200, 756 P.2d 438 (1988).

⁷ K.S.A. 1998 Supp. 44-523(a); Pyeatt, *supra*.

⁸ Teague v. George, 188 Kan. 809, 365 P.2d 1087 (1961).

⁹ Larson's Workers' Compensation Law, § 81.51(a).

12. The claimant argues that the request for review and modification is insufficient to allege a basis for reviewing the order granting benefits. The Appeals Board disagrees as the claimant argues form over substance. Kansas Administrative Regulation provides that an "Application for review and modification pursuant to K.S.A. 44-528 shall set forth at least one of the reasons contained therein."¹⁰ Within the same general time frame of filing the request for review and modification, National Beef and its insurance carrier also filed other pleadings and an affidavit from Victoria Acosta of Austin, Texas, setting forth statements of fact that would lead a reasonable person to believe that claimant had misrepresented her true identity or committed serious misconduct throughout this proceeding. Those pleadings asking that the order awarding benefits be vacated and stayed, along with the Victoria Acosta affidavit, supplement the application for review and modification providing notice to claimant of the issues for review. The Appeals Board concludes that the request for review and modification filed by National Beef and its insurance carrier satisfies the applicable statute and regulation.

13. The claimant argues the Judge lacked the authority to compel her attendance at a deposition and to produce certain documents. The Appeals Board disagrees. The Workers Compensation Act specifically provides that an administrative law judge has the power to compel witnesses to attend hearings and produce documents. The Act reads:

The director and the board, for the purpose of the workers compensation act, shall have power to administer oaths, certify to official acts, take depositions, issue subpoenas, compel the attendance of witnesses and the production of books, accounts, papers, documents, and records to the same extent as is conferred on district courts of this state under the code of civil procedure.¹¹

Administrative law judges shall have power to administer oaths, certify official acts, take depositions, issue subpoenas, compel the attendance of witnesses and the production of books, accounts, papers, documents and records to the same extent as is conferred on the district courts of this state, and may conduct an investigation, inquiry or hearing on all matters before the administrative law judges. . . .¹²

Based upon that statutory language, the Appeals Board concludes that the Judge did not err by ordering claimant to attend a deposition and produce documents concerning the proof of her identity.

¹⁰ K.A.R. 51-19-1.

¹¹ K.S.A. 44-549(b).

¹² K.S.A. 44-551(b)(1).

14. Claimant argues the Judge erred by taking under advisement her request for penalties. The Appeals Board disagrees. These are exceptional circumstances. There is a preliminary showing that fraud or serious misconduct may exist that may require the initial award either to be voided or, perhaps, modified with respect to all findings of permanent partial general disability. Under these exceptional circumstances, the Appeals Board concludes the Judge did not err by taking the request for penalties under advisement. The claimant cannot now complain of circumstances that only she has created.

15. For the reasons above, the benefits payable to claimant are ordered stayed and this proceeding is remanded to Judge Fuller to address the remaining issues.

ORDER

WHEREFORE, the Appeals Board stays the payment of benefits in this proceeding while the review and modification proceeding is pending; affirms the order taking under advisement the request for penalties; affirms the order to compel claimant to appear at a deposition and produce documents concerning her identity; denies the request to dismiss this claim at the request of Victoria Acosta of Austin, Texas; and remands this claim to the Judge to address the remaining issues.

IT IS SO ORDERED.

Dated this ____ day of November 1999.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Diane F. Barger, Wichita, KS
D. Shane Bangerter, Dodge City, KS
Pamela J. Fuller, Administrative Law Judge
Philip S. Harness, Director